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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OLYMPIC AIRWAYS,

Petitioner,

—v.—

RUBINA HUSAIN, ETC., *ET AL.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER OLYMPIC AIRWAYS

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REPLY TO COUNTER-STATEMENT OF THE FACTS

Respondents and the Solicitor General recharacterize what transpired on OLYMPIC AIRWAYS flight 417 as a "medical crisis" and as the failure of a crew member to respond to the needs of an ill passenger. Brief for Respondents ("R. Brief") at 11, 25, 26, 28, 30, 32; Brief for the United States Amicus Curiae Supporting Respondents ("S.G. Brief") at 10-11, 14-15, 17, 19, 22, 25. The record, however, clearly shows that:

- while Dr. Hanson and Ms. Husain knew that he was ill as a result of his exposure to smoke in the Athens airport, OLYMPIC AIRWAYS was never told that Dr. Hanson was ill (Pet. App. at 6a);[1]
- Dr. Hanson and Ms. Husain knew that this was a smoking flight three OLYMPIC AIRWAYS flights prior to their travel on flight 417 (Pet. App. at 5a-6a);
- neither Dr. Hanson nor Dr. Sabharwal, an allergist who was traveling with Dr. Hanson, ever requested that Dr. Hanson be moved or advised that he was ill; and
- although Ms. Husain requested that Dr. Hanson be moved twice prior to departure and once after take-off (immediately after smoking was allowed), neither Dr. Hanson, Ms. Husain *nor* Dr. Sabharwal ever advised the flight crew that Dr. Hanson was ill or suffering a "medical crisis" (Pet. App. at 6a-8a).

Moreover, there is no support in the record that OLYMPIC AIRWAYS insisted to anyone in the Hanson/Husain traveling party that Dr. Hanson remain in his non-smoking seat. In fact, the flight attendant specifically advised Ms. Husain that she was free to request another

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[1] References preceded by "Pet. App." refer to pages in the Appendix to the Petition for Writ of Certiorari.

passenger to change seats with Dr. Hanson (Pet. App. at 7a), but neither Dr. Hanson nor Ms. Husain ever did so. Pet. App. at 74a. Dr. Hanson, however, "chose not to act" (*id.*) and remained seated until after the meal service, when he walked to the galley area, collapsed and died.[2]

ARGUMENT

The question before the Court is not whether the Warsaw Convention[3] makes OLYMPIC AIRWAYS liable for wilful misconduct, as argued by Respondents. R. Brief at 13. The only issue to be decided is whether Dr. Hanson's death was caused by an "accident" within the meaning of Article 17 of the Convention.

Regardless of how stated, Respondents and the Solicitor General advance essentially three arguments to support the judgment (while taking care not to embrace the rationale of the court below, *see* R. Brief at 27): (1) that the term "accident" should be broadly construed to create liability for any unusual or unexpected "occurrence;" (2) that the signatories to the Convention did not intend to preclude liability for negligent conduct on the part of the carrier; and (3) that because the Convention provides the exclusive cause of action, the signatories must have intended to ensure a right of recovery whenever there is fault on the part of the carrier. Each of these arguments is premised on common-law policy grounds in an improper attempt to expand the meaning of "accident" to include an injury that is the result of the pre-existing health condition of a passenger.

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[2] Respondents estimate this time frame to be a "few hours." R. Brief at 4; *but see* Pet. App. at 41a ("Approximately two hours into the flight, the crew served a meal.")

[3] The complete text of the Warsaw Convention is set forth in the Appendix to the Brief of Petitioner Olympic Airways at 1a-20a.

I

"ACCIDENT" IS A TREATY TERM OF ART THAT MUST BE FLEXIBLY BUT FAITHFULLY APPLIED BY THE COURTS

A. "Accident" Requires An Inquiry Into The Injury Producing Event And Not Whether The Carrier Was Negligent

Respondents misconstrue OLYMPIC AIRWAYS' argument (R. Brief at 13-15, 19-20, 25-30, 33, 37) in their attempt to manufacture an Article 17 "accident" where none exists. OLYMPIC AIRWAYS' position can be summarized as follows:

- the failure to act (whether unexpected or unusual) is not an "event" or "happening;"
- the failure to act can lead to an "event" or "happening," but did not in this case; and
- the decisions of the courts below improperly focused on crew negligence and held that any crew negligence is equivalent to the necessary "event or happening," rather than identifying the actual injury producing "event or happening" (here, the presence of smoke in the aircraft cabin).

OLYMPIC AIRWAYS' argument starts with the premise firmly established by the Court's decisions in *Air France v. Saks*, 470 U.S. 392 (1985), *Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530 (1991) and *El Al Israel Airlines, Ltd. v. Tseng*, 525 U.S. 155 (1999) that Article 17 of the Warsaw Convention creates a presumption of liability when the conditions precedent—that there has been an "accident" and that it caused a passenger bodily injury or death—have been met. As explained by *Saks*, if the injury is caused by the passenger's internal reaction to

the normal operation of the aircraft, there can be no "accident." *Id.* at 406. In determining whether there has been an "accident," all courts before and after *Saks* (until certain post-*Tseng* cases) have focused on whether there was an injury producing event and whether that event was unusual, unexpected and external to the passenger.

Here, Respondents and the Solicitor General attempt to deflect the Court's attention away from the injury producing event, *i.e.*, the smoke in the aircraft cabin, arguing that a crew member's failure to move Dr. Hanson in response to Ms. Husain's requests was contrary to industry standards and custom and, thus, *ipso facto*, was an "accident." Because the injury producing event about which Ms. Husain complained was the *usual and expected* presence of smoke on a smoking flight, there can be no "accident" within the meaning of Article 17.

1. *Saks* Already Has Defined The Article 17 Term "Accident"

By reliance upon dictionary and legal definitions of the term "accident" and its supposed common usage, Respondents argue that "accident" under the Convention must be construed as broad ranging and all inclusive. R. Brief at 9, 14, 16-24. Respondents then posit that an Article 17 "accident" can be any "occurrence" so long as it is "unusual" (here, a violation of OLYMPIC AIRWAYS and industry standards) and has a link to the passenger's injury. R. Brief at 14, 17-18, 20-21, 24, 26-28, 42-43. Despite their quoted dictionary definitions, even Respondents agree (R. Brief at 19) that the term "accident" under Article 17 already has been defined by *Saks*:

- A passenger's injury must be caused by an accident, and an accident must mean something different than an "occurrence" on the plane. *Saks*, 470 U.S. at 403.

- [L]iability under Article 17 of the Warsaw Convention arises only if a passenger's injury is caused by an unexpected or unusual event or happening that is external to the passenger. *Id.* at 405.

While *Saks* noted that the term "accident" has been interpreted broadly by the lower courts in a variety of contexts, the Court made clear that the courts "nevertheless refuse to extend the term to cover routine travel procedures that produce an injury due to the peculiar internal condition of a passenger." *Id.* at 404-05. Respondents and the Solicitor General ignore this critical distinction. Even when the "accident" condition precedent is "flexibly applied" (*id.* at 405), a carrier should not be held liable for a passenger's peculiar internal reaction to the usual and expected presence of smoke on a flight where smoking was known to be permitted.

Respondents highlight the *Tseng* Court *dicta* as to whether the Second Circuit "flexibly applied" the accident analysis. R. Brief at 21-22, *citing*, 525 U.S. at 165 n9, 172. The most that can be gleaned from *Tseng* on this point, however, is that an intrusive security search possibly could be considered an unexpected or unusual event. Of course, if a person undergoing such a security search sustains a bodily injury, that injury likely would be the result of an injury producing event. The event, however, would not be the mere performance of a "routine" security search. No matter how flexibly the term "accident" is applied, the routine presence of ambient smoke on a smoking flight (the injury producing event here) cannot properly be considered unusual or unexpected. This case does not present an "accident."

2. A Flexible Definition Does Not Properly Equate "Accident" With Negligence

In the absence of an unusual or unexpected injury producing event, Respondents and the Solicitor General focus on crew negligence (*e.g.*, violation of standards, reasonableness of conduct, duty to act), which is not the proper focus of the Article 17 "accident" inquiry. The Court should reject Respondents' speculation that "[w]hile Article 20 expressly extinguishes liability upon a showing of proper care, it necessarily *permits* liability for a death or bodily injury if the carrier cannot make that showing." R. Brief at 23 (emphasis in original).

A "fault" analysis is a negligence analysis. Acceptance of Respondents' argument would require the Court not only to negate the Article 17 "accident" condition precedent and *Saks*' requirement that there be an injury producing event, but also reject the long line of cases refusing to impose liability arising out of a passenger's pre-existing health condition. *See* Brief of Petitioner at 21 & 21n.

The fallacy of Respondents' reasoning is illustrated by the fact that an Article 17 "accident" can take place even where the conduct that leads to the "accident" was *not* negligent.[4] For example, a passenger physically assaulted by another passenger may claim that the assault was unprecipitated and that there was an external, unusual and unexpected event irrespective of carrier negligence. Whether there has been an "accident" should not depend upon whether the carrier is entitled to avail itself of Article 20's "all necessary measures" defense

[4] Whether an "accident" also requires that the injury producing event relate to the operation of the aircraft (as advocated by the Solicitor General) is an issue that need not be reached herein. *See* S.G. Brief at 14-15.

(or be negated by the passenger's contributory negligence under Article 21). As stated in *Abramson v. Japan Airlines Co.*, 739 F.2d 130, 133 (3d Cir. 1984), "the alleged acts and omissions of JAL and its employees during the routine flight . . . do not constitute an 'accident' for which the Warsaw Convention imposes liability upon the carrier."[5] Failure of a carrier to take "all necessary measures" does not create an "accident."

3. The Proper Focus Of The "Accident" Inquiry Is On The Injury Producing Event

Respondents acknowledge that the "Article 17 and Article 20 inquiries ask separate questions and thus require separate answers" (R. Brief at 36), but nonetheless improperly fuse these questions to support the judgment. While the inquiries may be similar, it is axiomatic that there can be an "accident" without negligence and there can be negligence without an "accident." As explained by *Saks*, the proper focus "involves an inquiry into the nature of the event which *caused* the injury rather than the care taken by the airline to avert the injury." 470 U.S. at 407 (emphasis in original). OLYMPIC AIRWAYS is simply following the *Saks* focus and is not "mixing up" the question of "accident" with causation. *See* R. Brief at 37.

The text of Article 17 confirms the reason for focusing on the injury producing event, rather than the negligence of the carrier. If negligence is the focus of the "accident" analysis, the language of Article 17 precludes

[5] *See also McDonald v. Korean Air*, 2002 Carswell Ont. 3094 at ¶17, 2002 WL 1861837, at *4 (Ont. S.C.J. Sept. 18, 2002) ("I find that in not advising passengers of the risk they assume, an airline may be negligent, but this negligence is not in itself an *accident* within the meaning of Article 17 in the sense that the DVT sustained by the plaintiff is not linked to an unusual and unexpected event external to him as a passenger."), *aff'd*, 171 O.A.C. 368 (Ont. C.A. Feb. 18, 2003), *leave to appeal refused by*, No. 29708 (S.S.C. Aug. 28, 2003) (Canada).

carrier liability for any negligence which does not take "*place on board the aircraft or in the course of any of the operations of embarking or disembarking.*" Instead, courts properly must focus the inquiry on the injury producing event and then determine whether that event was external, unusual and unexpected.[6] To illustrate, where a passenger is injured during a hijacking, the "accident" is not the alleged negligent screening, but the hijacker's act of injuring the passenger.

Courts have had no difficulty in concluding that bodily injury or death as a result of a hijacking is damage that has been caused by an "accident" *irrespective of where the negligence took place*. In the cases cited by *Saks* which involved an "accident," the inquiry centered on the injury producing event. *Evangelinos v. Trans World Airlines, Inc.*, 550 F.2d 152 (3d Cir. 1977), *Day v. Trans World Airlines, Inc.*, 528 F.2d 31 (2d Cir. 1971), and *Krystal v. British Overseas Airways Corp.*, 403 F. Supp. 1322 (C.D. Cal. 1975) involved torts committed by terrorists; the injury producing event was the conduct of the terrorists.[7] In *Oliver v. Scandinavian Airlines Sys-*

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[6] *Compare* cases finding "accident": *Fishman v. Delta Air Lines, Inc.*, 132 F.3d 138, 141-42 (2d Cir. 1998); *Gezzi v. British Airways PLC*, 991 F.2d 603, 605 (9th Cir. 1993); *with* cases finding no "accident": *Potter v. Delta Air Lines, Inc.*, 98 F.3d 881, 883-84 (5th Cir. 1996); *Cush v. BWIA Int'l Airways, Ltd.*, 175 F. Supp. 2d 483, 488-89 (E.D.N.Y. 2001); *Farra v. American Airlines, Inc.*, 2000 WL 862830, at *3 (E.D. Pa. June 28, 2000); *Brandt v. American Airlines*, 2000 WL 288393, at *7-8 (N.D. Cal. Mar. 13, 2000); *Warshaw v. Trans World Airlines, Inc.*, 442 F. Supp. 400, 407 (E.D. Pa. 1977).

[7] These cases did not analyze the "accident" issue but simply followed *Husserl v. Swiss Air Transport Co.*, 351 F. Supp. 702 (S.D.N.Y. 1972), *aff'd*, 485 F.2d 1240 (2d Cir. 1973), which applied a hazards of air travel test to find that a hijacking can be an "accident." Regardless of whether this was a valid test (a similar test implicitly was rejected by *Saks*), the result is the same, an "accident" as it falls squarely within the *Saks* definition.

tem, 17 Av. Cas. (CCH) 18,283, 18,284 (D. Md. 1983), the court found that an "accident" occurred when a fellow passenger fell unexpectedly on the plaintiff, stating that "the proper focus is on what happened to the passenger." In *Weintraub v. Capitol Int'l Airways, Inc.*, 16 Av. Cas. (CCH) 18,058, 18,059 (N.Y. App. Div. 1981), the court focused on the sudden unexpected aircraft nose dive and not the reason for it. Even in *DeMarines v. KLM Royal Dutch Airlines*, 580 F.2d 1193, 1197-98 (3d Cir. 1978), the conflicting evidence focused on whether the aircraft pressurization system (*i.e.*, the injury producing event) functioned normally and not on the reason for its alleged malfunction.

Although *Saks* does not foreclose liability where there has been an injury producing event to a passenger with a pre-existing medical condition, *Saks* makes clear that there can be no liability if the injury producing event was normal and expected. 470 U.S at 404-05. For example, in *Abramson*, the Third Circuit found no "accident" when it focused on the injury producing event (sitting in his assigned seat), irrespective of allegations of crew negligence. 739 F.2d 130.

As explained by the Eleventh Circuit in *Krys v. Lufthansa German Airlines*, 119 F.3d 1515, 1521 n10 (11th Cir. 1997), the "accident" inquiry requires the identification of the relevant event by asking "what precise event or events allegedly caused the damage sustained by the plaintiff." In *Krys*, the relevant injury producing event was the continuation of the flight and resultant delay in hospitalization (*id.*), not the carrier's alleged negligence (*id.* at 1524 n17). Here, the injury producing event was exposure to ambient smoke while Dr. Hanson remained in his assigned non-smoking seat. The smoke aggravated his pre-existing asthmatic con-

dition and led to his death, not the flight attendant's failure to act or violation of industry standards.

Respondents neither reject nor meaningfully distinguish *Krys*, *Abramson*, or any of the other cases relied upon by OLYMPIC AIRWAYS. The Solicitor General disputes that *Krys* and *Abramson* (cited with approval by *Saks*, 470 U.S. at 405)[8] are consistent with *Saks* (S.G. Brief at 27-29) and yet agrees, as he must, that an injury resulting from deep vein thrombosis or a pre-existing health condition unrelated to the operation of the aircraft is not an "accident."[9] The Solicitor General's inconsistencies also are evident in his failure to explain how there could be an "accident" in *Krys*, *Abramson* and this case, but not in *Rajcooar* and *Northern Trust*. No valid distinction can be made. *See Rajcooar*, 89 F. Supp. 2d at 328 (allegedly inadequate medical care not an "accident"); *Northern Trust*, 491 N.E.2d at 422-23 (no "accident" despite allegations that the airline was negligent and violated its procedures for handling ill passengers).

4. Carrier Conduct That Was A Link In The Chain Of Causation Cannot Substitute For The Absence Of An Unusual and Unexpected Injury Producing Event

Respondents argue that the only requirement for an "accident" is some unusual and unexpected "occurrence"

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[8] *But see* Brief for the United States as Amicus Curiae Supporting Reversal, 1984 WL 565687, at *20. (In *Saks*, the Solicitor General took the position that the Third Circuit's application of the *DeMarines* standard in the *Abramson* decision was an example of the proper interpretation of the "accident" requirement).

[9] *See* S.G. Brief at 14, *citing*, *Rajcooar v. Air India Ltd.*, 89 F. Supp. 2d 324, 328 (E.D.N.Y. 2000); *Northern Trust Co. v. American Airlines, Inc.*, 491 N.E.2d 417, 422 (Ill. App. Ct. 1986); and *Scherer v. Pan Am. World Airways Inc.*, 54 A.D.2d 636, 387 N.Y.S.2d 580, 581 (App. Div. 1976).

in the chain of causation and that violation of industry standards is such an occurrence. *See, e.g.*, R. Brief at 11-12, 26. According to Respondents, the fact that Dr. Hanson had a pre-existing "medical condition" (*i.e.*, asthma and allergies) is irrelevant to the "accident" inquiry because there was a violation of an industry standard. R. Brief at 12, 25-26, 37-39. Respondents and the Solicitor General are unable to cite to a single case in which a court found an Article 17 "accident" based upon carrier conduct that was a remote, rather than direct, cause of the death or injury. Likewise, they cite no case finding an "accident" absent a direct injury producing event.

Saks requires an injury producing event, not merely an occurrence. The "unusual event" requirement takes on added significance in this case because, as acknowledged by the court below, Dr. Hanson's death was a result of his asthma, *i.e.*, his internal reaction to ambient smoke on board a flight where smoking was permitted. Pet. App. at 47a. To the extent that Respondents argue that *any* link in the chain of causation satisfies the "accident" requirement, they simply are wrong.

B. An Omission Or Failure To Act Is Not An "Event"

Respondents and the Solicitor General dismiss the distinction between "event" and "omission" as unfounded, arguing that an "accident" necessarily includes the failure to act or an "occurrence" so long as it is unusual. R. Brief at 30-31; S.G. Brief at 17.[10] The significance of the injury producing event in the "accident" analysis, however, is made clear when an unusual or unexpected injury producing event has not happened.

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[10] An attempt to avoid this distinction may account for Respondents' repeated use of the term unusual "occurrence" throughout their Brief, rather than the terms "event" or "happening" which were adopted by the Court in *Saks*.

Neither Respondents nor the Solicitor General are able to provide the Court with an example of an omission/failure to act as the identifiable event because an omission or failure to act is a non-event. A fair reading of every Article 17 "accident" case demonstrates that the injury producing event or happening necessarily involved an "act" rather than a failure to act. A failure to act, as here, cannot be the event; it simply may lead to an event. If it does not lead to an injury producing event, there has been no "accident." Even if an omission or failure to act leads to an injury producing event, the passenger still must establish that the injury producing event itself was external, unusual and unexpected for there to be an Article 17 "accident."

Respondents' example of the cook forgetting to turn off a cooking flame, causing a grease fire and then burning a person's arm demonstrates the fallacy of their reasoning. R. Brief at 16. The omission (*i.e.*, the failure to turn off the flame) is not the Article 17 "accident." Rather, the omission led to a grease fire (the unusual event/"accident"), resulting in the injury.

The distinction between an affirmative injury producing event and an omission is not a mere matter of semantics. R. Brief at 30-31. Historically, the distinction has been clear and valid in the context of Article 17, and the signatories' understanding of the difference was documented as early as 1949. *See* International Civil Aviation Organization ("ICAO") Legal Committee, *Minutes and Documents of the Fourth Session, Montreal, 7 June –18 June 1949, Report of the Sub-Committee on the Revision of the Warsaw Convention*, ICAO Doc. 6027-LC/124 at 270 (1949) (In rejecting replacement of "accident" with occurrence, it was noted that "the broader term 'occurrence' should be applied to damage sustained in the case of carriage of cargo or baggage, since *the*

term would include not only an accident but also cases where nothing of a positive nature had happened.") (emphasis added).

This distinction was reaffirmed this year by the English Court of Appeal in *Deep Vein Thrombosis and Air Travel Group Litigation*, [2003] EWCA Civ. 1005, 2003 WL 21353471 (C.A. Eng. July 3, 2003), *request for leave to appeal filed* (H.L.) (U.K.), where plaintiffs sought to recover damages allegedly sustained as a result of deep vein thrombosis ("DVT"). They argued that there was a causal link between air travel and the onset of DVT and that the air carriers' failure to warn passengers of a DVT risk was an Article 17 "accident." The Court of Appeal (Master of the Rolls, Lord Phillips) affirmed the dismissal of the action by the lower court and concluded that a failure to act could not be an "accident" within the context of Article 17:

> A critical issue in this appeal is whether a failure to act, or an omission, can constitute an accident for the purposes of Article 17. Often a failure to act results in an accident, or forms part of a series of acts and omissions which together constitute an accident. In such circumstances it may not be easy to distinguish between acts and omissions. I cannot see, however, how inaction itself can ever properly be described as an accident. It is not an event; it is a non-event. Inaction is the antithesis of an accident.

Id. at ¶ 25, 2003 WL 21353471, at *5-6.

While Lord Phillips correctly addressed the distinction between an event and an omission when addressing DVT and other alleged "accident" cases, he failed to apply the proper standard to the Ninth Circuit's *Husain* decision. *Id.* at ¶¶ 47-50, 2003 WL 21353471, at *9-10. Lord

Phillips neglected to recognize that, once he agreed that the direct cause of Dr. Hanson's death was the smoke and that smoke was not unusual in the cabin, his questioning of the rationale of the decisions below should have caused him to question the judgment. Moreover, Lord Phillips' characterization of the circumstance as an "enforced exposure" to smoke could only have resulted from his misapprehension of the *Husain* record. Lord Phillips overlooked that Dr. Hanson had known for quite some time that this was a smoking flight; that his assigned non-smoking seat was located near the smoking section; that Dr. Hanson chose not to leave his seat until after the meal service; and that the flight attendant specifically advised Ms. Husain that she or Dr. Hanson could try and change seats with another passenger. Thus, application of Lord Phillips' analysis to the facts of this case results in a finding of no "accident."

Respondents also attempt to justify their rejection of the distinction between act and omission by arguing that Articles 20(1) and 25 contemplate defaults or inactions and therefore so must Article 17. R. Brief at 31. However, Articles 20(1) and 25 have no bearing on whether an omission can properly satisfy Article 17. As recognized by Lord Phillips, the scope and purposes of Articles 20(1) and 25 are different and wider than that of Article 17. *Id.* at ¶62, 2003 WL 21353471, at *12.[11]

[11] In *Scherer*, 387 N.Y.S.2d at 581, the court found no "accident" because the injury producing event was sitting in the assigned airline seat. The Solicitor General's support of *Scherer* but later adoption of *Povey v. Civil Aviation Safety Authority and Ors*, [2002] V.S. Ct. 580 (Victoria, Australia, Dec. 20, 2002), *appeal argued*, No. 7223/01 (Victoria C.A. July 28, 2003) ("*Povey*") demonstrates that the Solicitor General has put forth an unworkable "accident" standard. S.G. Brief at 14, 21. *Povey* is incorrect and should be rejected by this Court, just as it has been rejected by both the English Court of Appeal in the DVT Litigation decision and *Rynne v. Lauda-Air Luftfarht Aktiengesellschaft*, D5586/2001 (Dist. Ct. Queensland, Australia, Feb. 7, 2003) (http://www.courts.qld.gov.au/qjudgment/QDC%202003/QDC03-004.pdf), a sister Australian court decision.

In sum, while the conduct of the OLYMPIC AIRWAYS flight attendant may have constituted an omission, it certainly was not the injury producing event. Accordingly, and contrary to the decisions of the courts below, Dr. Hanson's death was not the result of an Article 17 "accident."

II

THE EXCLUSIVITY OF THE WARSAW CONVENTION HAS NO BEARING ON WHETHER THERE HAS BEEN AN "ACCIDENT"

Respondents and the Solicitor General continually return to the propositions that it is unlikely that the Convention signatories intended to relieve the carriers of liability for deaths caused by their misconduct and that such a result is all the more unlikely because the Convention provides the exclusive cause of action. R. Brief at 13, 24, 32, 41-42, 44; S.G. Brief at 28-29. These propositions are without evidentiary support and are contrary to *Tseng* and to the text and drafting history of the treaty.

A. The *Tseng* Exclusivity Ruling Did Not Change The Meaning Of "Accident"

No evidence exists in the text or drafting history of the Convention that the meaning of "accident" is dependent on the Convention's exclusivity, a proposition the Court rejected in *Tseng*. *See Tseng*, 525 U.S. at 171-72. As discussed in OLYMPIC AIRWAYS' Brief, this is a recent argument invoked as justification for rejecting the pre-*Tseng* cases and redefining "accident" to conform to

the common law perception of what is fair. Brief of Petitioner at 28-31. In effect, because state tort law claims have been foreclosed by *Tseng*, the courts below, Respondents and the Solicitor General have re-introduced concepts of negligence into the Convention through a re-definition of an Article 17 "accident." The Convention and the meaning of "accident" cannot properly be viewed through a common law negligence perspective, particularly since re-casting "accident" in negligence terms nullifies the exclusivity recognized by *Sidhu* and *Tseng*.[12] *Sidhu v. British Airways Plc*, [1997] 2 Lloyd's Rep. 76, 1996 WL 1092197, at *84 (H.L.) (U.K.); *Tseng*, 525 U.S. at 173.

Although *Tseng* reaffirmed that the *Saks* definition of "accident" should be flexibly applied, this was not an open invitation to redefine and expand its meaning. As *Saks* cautioned, "[u]ntil Article 17 of the Warsaw Convention is changed by the signatories, it cannot be stretched to impose carrier liability for injuries that are not caused by accidents."[13] 470 U.S. at 406. In fact, the "accident" requirement remains in the Montreal Convention of 1999 to which the United States adhered only last month.[14]

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[12] Indeed, the issue of the Convention's exclusivity had no role in the *Saks* definition of "accident," even though plaintiff argued that her failure to warn claims should go forward independent of the liability provisions of the Convention. *See* Brief for Respondent Valerie Hermien Saks, 1984 WL 565683, at *46. Plaintiff had not properly preserved the issue. 470 U.S. at 408.

[13] The Court in *Zicherman v. Korean Air Lines Co.*, 516 U.S. 217, 231 (1996) rebuffed a similar argument. *See* Brief of Petitioner at 30.

[14] Convention for the Unification of Certain Rules for Carriage by Air, opened for signature on 28 May 1999, Treaty Doc. 106-45 (ratified by the United States on September 5, 2003 and will enter into force on November 4, 2003).

The fact that a passenger who is unable to satisfy the conditions for liability under the Convention will be left without a remedy may appear harsh when viewed from the common law perspective that every wrong requires a remedy, but this is not a valid basis for redrafting a treaty provision to create liability where none was intended. *See Sidhu*, 1996 WL 1092197, at *87. To embark upon such a path is not the function of the courts and would open the door to reinterpretation of the Convention's other conditions that, if not satisfied, also would foreclose recovery. These treaty conditions include, for example, the requirements for "bodily injury" (Article 17), notice of claim (Article 26) and the period of limitations (Article 29).

The Court should not, as urged by Respondents and the Solicitor General, manipulate the "accident" definition now that the Convention has been found to be exclusive. It is the duty of the courts "to enforce the . . . treaties of the United States, whatever they might be" (*Saks*, 470 U.S. at 406 (quoting *Reed v. Wiser*, 555 F.2d 1079, 1093 (2d Cir. 1977)), rather than manipulate its terms to reach what Respondents and the Solicitor General consider to be a more desired result. *See also Tseng*, 526 U.S at 171 n12; *Chan v. Korean Air Lines, Ltd.*, 490 U.S. 122, 134-35 (1989).

B. The Drafters Did Not Intend To Create Liability For Injuries Due To The State Of A Passenger's Health

Respondents acknowledge that one of the primary goals of the Convention was to limit carrier liability and that the Convention's language should be construed in a "manner that fits with the objectives of the treaty as a whole." R. Brief at 13. Respondents nevertheless argue that a balance was struck permitting passengers to "pro-

ceed with claims based on the failure of a carrier to observe governing industry standards" (R. Brief at 42), clearly a common law negligence concept.

While the drafters sought to eliminate the practice in 1929 of air carriers contracting out of any liability, they never intended to impose common law liability on the carriers. *See* Brief of Petitioner at 15-16. The balance struck was presumptive but limited liability in return for not being able to disclaim all liability in the contract of carriage, *provided the conditions of Article 17 were met.*

The drafting history related to Article 17 demonstrates that draft Article 22 (which eventually was divided into Articles 17, 18, 19), as submitted to the Warsaw conference, broadly stated that the "carrier shall be liable for damage sustained during carriage." *See Saks*, 470 U.S. at 401. This broad liability language in the draft, however, was narrowed significantly in the adopted version before the Court (*id.* at 402), which added the liability condition precedent language "accident which caused the damage." This change, coupled with Article 24 (which restricts passenger claims to the conditions and limits set out in the Convention), confirms that it would be improper to broadly equate an Article 17 "accident" with the local common law notions of duty and negligence. *See Tseng*, 525 U.S. at 171. When the Convention intends to refer an issue to local law, it does so expressly. *See, e.g.*, contributory negligence standard (Article 21); damages/beneficiaries (Article 24(2)); calculation of the period of limitations (Article 29).

Importing common law concepts to define the treaty term "accident" would be contrary to the uniformity sought to be achieved by the Convention. Although the Convention was intended to provide "some relief for passengers" (R. Brief at 13), it was only on the condition that the threshold requirements for liability in Article 17

were fulfilled, regardless of fault. Thus, Respondents misapprehend the nature of the balance that was struck by the Convention's drafters and the underlying purpose of the "accident" condition precedent, which is not necessarily met by proof of negligence. *See* R. Brief at 10-11, 22-24, 32-35, 42; S.G. Brief at 23-24.

Finally, Respondents refuse to accept that the post-ratification conduct of the Contracting States is significant for what the States did not do. The Contracting States did not change the meaning of "accident," let alone expand it. R. Brief at 43. The only time Article 17 was significantly broadened was under the never adopted Guatemala City Protocol (1971). *See* Brief of Petitioner at 34. While the trend by the Convention's signatories has been to abandon the limits of liability for passenger injury or death, they have not expanded the basis of air carrier liability under Article 17. The "accident" term in Article 17 has not been amended. In fact, after consideration was given to use of the term "event," both at the 1999 Montreal conference and in the preparatory meetings leading to the conference, the drafters expressly decided to retain the unamended term "accident" "[s]o as not to lose the considerable precedent developed over many years upon the scope of liability created by Article 17 of the Warsaw Convention." ICAO, *III International Conference on Air Law, Montreal, 10-28 May 1999, Preparatory Material*, ICAO Doc. 9775-DC/2 at 65 (1999) (1997 Report of the Rapporteur); *see also id.* at 169-70 (1997 Report of the ICAO Legal Committee).

The signatories to the Warsaw Convention had a clear opportunity to expand the basis of carrier liability in 1999 by replacing the term "accident" with "event." They did not do so. Respondents and the Solicitor General are now asking the Court to do what the treaty signatories have refused to do for nearly 75 years.

CONCLUSION

For the foregoing reasons, the decision and judgment of the Court of Appeals for the Ninth Circuit should be reversed in all respects.

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Respectfully submitted,

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